
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUSTIN KONG CHANTHAVONG,

Defendant.

**ORDER GRANTING DEFENDANT’S
MOTION TO SUPPRESS**

Case No. 2:18-cr-440-JNP

District Judge Jill N. Parrish

Defendant Justin Kong Chanthavong (“Defendant”) moves the court to suppress a firearm that was discovered during the search of a residence on April 20, 2018. Defendant also moves to suppress statements he made to the police regarding the firearm. On July 15, 2019, the court held an evidentiary hearing on Defendant’s Motion to Suppress.¹ Following briefing, the court heard oral argument on the motion. For the reasons stated below, the court **GRANTS** the motion to suppress.

I. FINDINGS OF FACT

Based upon the evidence presented during the evidentiary hearing, the court makes the following factual findings:

Defendant was a fugitive of the State of Utah for several months prior to April of 2018. On April 19, 2018, Defendant became a suspect for aggravated assault when a vehicle he was driving was stopped by officers from the West Valley Police Department and abruptly sped away,

¹ At the end of the evidentiary hearing on July 15, 2019, defense counsel requested that the court keep the hearing open to secure the attendance of a defense witness who had been subpoenaed but had failed to appear. The court granted defense counsel’s request. On July 22, 2019, defense counsel filed a status report with the court, stating that attempts to secure the appearance of the witness had failed. Docket No. 37. At defense counsel’s request, the court then closed the evidentiary portion of the proceedings.

nearly striking an officer. The vehicle drove through a public park and the occupants evaded arrest. Following this incident, officers determined that the vehicle involved had been rented by Julian Xayaso (“Julian”). The address listed on the rental agreement was 4460 West 6200 South.

At approximately 1:00 a.m. on April 20, 2018, officers arrived at the listed address and began surveilling the property. Officers present at the scene included members of the Violent Fugitive Apprehension Strike Team (“VFAST”), a multi-agency task force comprised of local police officers and supervised by the United States Marshals Service. Between twenty to thirty-five law enforcement officers were present at the scene. While officers surveilled the property, they witnessed a black Acura driving away from the residence. Officers stopped the vehicle and discovered that the driver of the vehicle was an individual with the last name Chanthavong. Based on this encounter, officers suspected that Defendant Chanthavong might be in the Xayaso home. After stopping the vehicle, a group of officers secured the perimeter of the residence. Unified Police Officer Mike Ikemiyashiro oversaw the operation from the front yard of the residence. Several officers, including West Jordan Police Detective Charlie Sandness, Deputy U.S. Marshal Steven Douglas, and Supervisory Deputy U.S. Marshal Derryl Spencer approached the front door of the residence.

Around 2:45 a.m., officers knocked on the door of the residence to determine whether either Julian or Defendant Chanthavong was in the home. Nhot Xayaso (“Nhot”), Julian’s father and the owner of the home, answered the door. The officers began asking Nhot questions. Nhot, who is a 69-year-old refugee from Asia,² primarily responded to the officer’s questions using body language. He also mumbled words to the officers, but the officers could not understand what he was saying. Detective Sandness showed Nhot pictures of Julian and Defendant

² Defendant discovered this information through publicly available records of which the court takes judicial notice. Docket No. 47 at 10, n. 3. The Government has not objected to the court’s consideration of this information.

Chanthavong, asked if Julian was in the home, and requested permission to enter the home. After seeing the photos, Nhot nodded his head, pointed into the home, and stepped aside. The officers subsequently entered the home.

Once inside the home, officers began calling out for Julian. Defendant Chanthavong—who had been given permission to stay at the Xayaso residence by Julian, Julian’s brother, and Julian’s brother’s girlfriend—emerged from a door that led from the garage into the kitchen. Julian’s brother’s girlfriend, Taya, also emerged from the same door. Officers immediately handcuffed Defendant in the kitchen. Shortly after officers apprehended Defendant Chanthavong, Julian emerged from a room on the second floor of the home and was also handcuffed. Officers then led both Defendant Chanthavong and Julian outside the residence. Taya was not apprehended, but officers also led her outside the residence for questioning.

Officers inside the residence then conducted a safety sweep of the premises. During the safety sweep, a group of officers entered the room behind the garage from which Defendant had emerged. The room was later determined to be the area where Defendant had been sleeping. Upon entering the room, officers noticed in plain view what appeared to be a rifle that was partially tucked into a black bag next to a bed. Deputy Douglas reported “a possible 88 in plain view” over the radio to his supervisor, which meant that a gun had been found.

Deputy Derryl Spencer responded to the report, advising Douglas to “sit tight” and instructing him that the officers would wait for a search warrant. Officer Ikemiyashiro drafted an affidavit for a search warrant of the house and submitted the affidavit at 4:11 a.m. The affidavit included information that had been ascertained during the interviews of Taya and Defendant. The search warrant was signed at 4:18 a.m. When the rifle was removed from the bag, officers

discovered that it was actually an airsoft gun. However, a handgun was subsequently found in the same bag.

Meanwhile, Unified Police Officer Nathan Lord and Detective Sandness interviewed Julian, Taya, and Defendant Chanthavong. Julian refused to speak with officers. Taya was interviewed next. Taya told officers that Defendant had been sleeping in the room at the back of the garage where the handgun had been found. Defendant was interviewed last. Officer Lord asked Defendant about the handgun that had been discovered. Defendant admitted that he had handled the handgun the previous night.

II. CONCLUSIONS OF LAW

A. Standing

“The Defendant has the burden of establishing his standing, or, in other words, a subjective expectation of privacy . . . that society is prepared to recognize as reasonable.” *United States v. Creighton*, 639 F.3d 1281, 1286 (10th Cir. 2011) (citing *United States v. Poe*, 556 F.3d 1113, 1121 (10th Cir. 2009)). “An individual does not have to be “settled” at a location to have a reasonable expectation of privacy; a simple overnight guest has Fourth Amendment standing.” *United States v. Poe*, 556 F.3d 1113, 1122 (10th Cir. 2009) (citing *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990)). However, “[i]n order for a social guest to qualify for protection under the Fourth Amendment, ‘there must be a “degree of acceptance into the household,” *United States v. Rhiger*, 315 F.3d at 1286 (10th Cir. 2003) (quoting *Carter*, 525 U.S. at 90, 119 S.Ct. 469) (internal quotation marks omitted), or an ““ongoing and meaningful connection to [the host's] home’ establishing the person's status as a social guest.” *Id.* at 1287.

Defendant argues that his status as an invited overnight guest at the Xayaso residence confers standing for him to challenge the search of the residence. Docket No. 47 at 6. Defendant

notes that three adult residents of the Xayaso home—Julian, Jerry, and Taya—gave him permission to spend the night at the home. Docket No. 50 at 2. Although Nhot, the homeowner, had not given explicit permission to Defendant to stay at the house overnight, during the evidentiary hearing, Defendant Chanthavong testified that “[e]verybody at the house was aware I was there,” and “[t]hey didn’t give me no [*sic*] time limit [to stay at the Xayaso residence].” Transcript at 118.

The Government responds that “the defendant has presented no evidence that he was invited to the Xayaso home by the homeowner Nhot, or that Nhot was okay with him being there.” Docket No. 49 at 6. The Government emphasizes Defendant’s own statement during the evidentiary hearing where, during cross-examination, he stated that he “wasn’t staying [at the Xayaso home].” Transcript at 117. According to the Government, in order to have standing to challenge the search, Defendant was required to present evidence that he was a regular social guest in the Xayaso residence or that he had a history of spending the night at the home. Docket No. 49 at 6. Instead, the Government argues, the evidence simply shows that Defendant smoked weed, took a Xanax pill, and inadvertently fell asleep at the house without obtaining permission to stay overnight. *Id.* Thus, the Government argues that Defendant lacks standing to challenge the warrantless search of the Xayaso residence.

The court finds that Defendant has established standing to challenge the search of the Xayaso residence. The evidence establishes that three adult residents of the home gave him permission to stay at the Xayaso residence, thus establishing a “degree of acceptance into the household.” *Rhiger*, 315 F.3d at 1286. Although no evidence has been presented to show that Nhot, the homeowner, explicitly gave Defendant permission to stay at the Xayaso residence overnight, based on the testimony elicited, the court finds that Nhot gave him implicit

permission. Indeed, Nhot was aware of Defendant's presence at the home between the hours of 2:00 a.m. and 4:00 a.m. and there is no evidence even suggesting that Nhot asked Defendant to leave or attempted to remove him from the home. Moreover, the Government has cited no authority indicating that a homeowner is the sole authorized member of a household who can give permission for an overnight guest. For these reasons, the court finds that Defendant was an invited overnight guest at the Xayaso residence, and thus has established standing to challenge the warrantless search conducted in the early hours of April 20, 2018.

B. Consent

"Law enforcement may search a residence [without a warrant] if the person in control of the residence voluntarily consents to the search." *United States v. Warwick*, 928 F.3d 939, 943 (10th Cir. 2019). However, "[t]he government bears the burden of proving a valid consent to a warrantless search." *United States v. Pena-Sarabia*, 297, F.3d 983, 986 (10th Cir. 2002) (citing *United States v. Cody*, 7 F.3d 1523, 1526 (10th Cir. 1993)). "When consent is relied on to justify the lawfulness of a search, the Government has the burden of showing that consent was, in fact, freely and voluntarily given, and this burden is not met by merely showing acquiescence to a claim of lawful authority." *United States v. Rodriguez*, 525 F.2d 1313 (10th Cir. 1975) (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968); *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973)). To satisfy this burden, the Government must establish two elements. "First, it [the Government] must present 'clear and positive testimony that consent was unequivocal and specific and freely and intelligently given.'" *United States v. Pena*, 143 F.3d 1363, 1366 (10th Cir. 1998) (quoting *United States v. Angulo-Fernandez*, 53 F.3d 1177, 1180 (10th Cir. 1995)). "Second, the government must show that the police did not coerce the defendant [or person in control of the residence] into granting his consent." *Id.*

1) Officers' Request to Search Home

Defendant argues that “no witness testified that they actually asked Nhot Xayaso for permission to enter the home.” Docket No. 47 at 9. Instead, Defendant contends that Officer Sandness showed Nhot a picture of Julian Xayaso and asked Nhot if Julian was home. *Id.* It was in response to this question, Defendant argues, that Nhot nodded, pointed to an upstairs room, and “kind of stepped to the side, just pointing inside.” *Id.* (quoting Transcript at 10, 12, and 37). Defendant argues that the evidence establishes only that Nhot nodded and pointed to affirm that Julian, or potentially Defendant Chanthavong, was present in the home. According to Defendant, “[i]n the absence of a request to come inside, the government has not established that Nhot consented to their entry.” *Id.*

The Government contends that the officers asked Nhot two distinct questions while speaking to him at the front door. The Government argues that the officers’ explicit request to enter, along with Nhot’s gestures indicating his consent, rendered the warrantless search valid. According to the Government:

After being shown pictures of Julian and Defendant and asked if they were in the home, Nhot nodded his head and pointed inside the house indicating that they were in the home. Then when asked if officers could come inside Nhot nodded his head up and down and with the door wide open moved to the side to allow officers to enter.

Docket No. 49 at 9 (citing Transcript at 36-37, 80).

Defendant correctly notes that there was some ambiguity in the testimony regarding the officers’ request to enter. Detective Sandness’s testimony at the evidentiary hearing was inconsistent. For example, on direct examination, Detective Sandness testified that he believed Nhot’s consent to enter the home was in response to Detective Sandness showing Nhot the pictures of Julian and Defendant Chanthavong:

Q Did you show him a picture of someone?

- A He was shown pictures of Julian and Justin.
Q What happened when he was shown pictures of Julian and Justin?
A He pointed inside and kind of stepped to the side, just pointing inside.
Q Did you believe that he was inviting you to come into the home?
A Yes.
Q Did you talk to him at all?
A I did not talk to him.

Transcript at 10-11.

However, on cross-examination, Detective Sandness testified that he explicitly asked for permission to enter the house:

- Q So in your report you wrote that you asked for permission to go in the house, right?
A Yes. That's what I wrote.
Q And you wrote that he gave you consent to go inside right?
A Yes.
Q But your testimony today is that you have no recollection of him saying anything to you in English, right?
A It was over a year ago. I don't remember.

Transcript at 23-24.

Finally, on re-direct examination, the Government's attorney asked Detective Sandness to identify the question to which Nhot was responding when he nodded and pointed:

- Q The defense attorney asked you about having a conversation with the homeowner. Did you have a conversation or did you ask him one question?
A I don't remember. I remember showing a picture.
Q So, I believe your report said that you asked, "Is Julian home?"
A Yeah. That's what my report says.
Q After you asked that one question, did he respond?
A I don't remember. He pointed—he pointed up to his room—or into the house towards the upstairs from what I remember.
Q Does your report state that he nodded his head yes in response to your question?
A Yes.
Q Does this indicate to you that he understood??
A Yes.

Transcript at 67.

In contrast to the testimony of Detective Sandness that he asked only if Julian was home, Officer Ikemiyashiro testified that Nhot specifically “allowed officers into the home.” Transcript at 46. And, an investigation report³ authored by Deputy Douglas six days after the search of the Xayaso residence indicates the following:

TFO Sadness [*sic*] showed the male [Nhot] a picture of Chanthavong and the male immediately moved his head up and down and pointed to the back of the house. DUSM Douglas asked if we can come inside the home to look for Chanthavong and the male nodded his head up and down.

Exhibit E at 1 (capitalization omitted).

Although the question is a close one, the court finds that the Government has established that officers requested permission from Nhot to enter the residence. Although Defendant correctly notes inconsistencies in the testimony, especially in the testimony of Detective Sandness, the court concludes that greater weight should be afforded to the report authored by Deputy Douglas six days after the search in question. Detective Sandness’s testimony at the evidentiary hearing, held over a year after the events of April 20, 2018, was highly equivocal, and he frequently admitted that he could not remember the details of what took place that night. *See e.g.* Transcript at 23-24, 67. Based on the totality of the circumstances, the court finds that the officers requested permission to enter the home.

2) *Non-Verbal Consent*

The court must now consider whether Nhot’s non-verbal communications with the officers constituted valid consent for the officers to conduct a warrantless search of the Xayaso residence. “To satisfy the first prong of the test for voluntariness of a consent to search, that

³ During the direct examination of Deputy Douglas, he testified that at Assistant U.S Attorney Thomas’ request, Deputy Douglas supplemented the original investigation report five months after authoring it to “clear up the timeline of events” regarding the time of the search warrant submission in relation to when the officers opened the bag that contained what officers believed was a rifle. Transcript at 71. Although the court finds the supplemental addition peculiar, it notes that Deputy Douglas’ account of the timeline regarding officers’ interaction with Nhot remained unchanged.

consent must be unequivocal and specific and freely given, the consent must be clear, but it need not be verbal.” *United States v. Guerrero*, 472 F.3d 784, 789-90 (10th Cir. 2007). “Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.” *Id.* (citing *United States v. Benitez*, 899 F.2d 995, 998–99 (10th Cir.1990); *United States v. Gordon*, 173 F.3d 761, 765–66 (10th Cir. 1999)). “Whether such consent has been given is a question of fact and is determined from the totality of all of the circumstances.” *United States v. Santurio*, 29 F.3d 550 (10th Cir. 1994) (citing *United States v. Mendenhall*, 446 U.S. 544 (1980)).

Although the Tenth Circuit has concluded that consent may be communicated non-verbally, there are limitations to the validity of such non-verbal consent. In *United States v. Benitez-Arreguin*, the Tenth Circuit affirmed a district court’s conclusion⁴ that the search of a suitcase at a train station was not consensual because the defendant did not speak English. 973 F.2d at 825. Even though officers “made signs which the defendant took to mean that they wanted to search the suitcases” and “[t]he defendant did nothing to stop them from searching the suitcases because they were policemen,” the district court found—and the Tenth Circuit affirmed—that the search of the bag was not consensual. *Id.* In affirming the district court’s conclusion regarding the search of the bag, the Tenth Circuit described the lower court’s decision as follows:

There was no clear and unequivocal or specific permission. The judge found there was implied duress and that the presumption against waiver of constitutional rights was not overcome. Also, there was an obvious language barrier and it was obvious to the officer that the defendant did not speak English. The pantomime gestures were not sufficient to produce a consent to search.

⁴ Although the Tenth Circuit affirmed this portion of the district court’s ruling, the Tenth Circuit reversed the district court’s conclusion that “the defendant’s subsequent disclaimer of ownership of the bag and his testimony regarding the circumstances by which he came into possession of the bag and where he was taking the bag, effectively destroys his standing to bring this motion to suppress.” *Benitez-Arreguin*, 973 F.2d at 826 (quoting I R. Doc. 21, at 2.).

Id. at 826.

In this case, Defendant argues that even if the officers did properly request permission to enter Nhot's home, Nhot's gestures— nodding, pointing, and stepping aside— did not amount to consent that was “unequivocal and specific and freely and intelligently given.” *Pena-Sarabia*, 297 F.3d at 986. First, Defendant argues that the Government has not established that consent was intelligently given because it has not shown that Nhot understood what the officers wanted. Docket No. 47 at 10. Second, Defendant argues that the Nhot's gestures were too equivocal and vague to establish valid consent. *Id.*

Defendant notes that Nhot is a 69-year-old refugee from Asia, and that none of the witnesses at the evidentiary hearing could attest to whether Nhot spoke any English. Docket No. 47 at 10 (citing Transcript at 40, 80). Defendant also notes that Deputy Douglas wrote in his report that when officers asked Nhot if Defendant was in the home, he “looked perplexed by the question.” Exhibit E at 1. Finally, Defendant argues that officers relied exclusively on Nhot's body language in obtaining consent because they were not sure whether Nhot spoke English. Thus, Defendant contends that the Government cannot establish neither that Nhot understood what the officers wanted nor that his consent was freely and intelligently given. *Id.*

Defendant also argues that Nhot's nodding and pointing were not “unequivocal and specific.” Nhot's gestures, according to Defendant, were too ambiguous to establish the parameters of any consent. Defendant argues that Nhot's gestures could have meant anything ranging from allowing the officers to go anywhere in the house to simply answering the officers' question regarding Julian and Defendant Chanthavong's whereabouts. Given the indeterminacy of the gestures, Defendant argues that the Government has not established that Nhot gave valid consent.

The Government responds that Nhot communicated his consent in a manner that was unequivocal, specific and intelligently given. According to the Government, the combination of Nhot's gestures were "proof of intelligent responses to the officer's questions and his acquiescence to the search." Docket No. 49 at 8. The Government cites Tenth Circuit precedent that establishes "a working knowledge of the English language is all that is required for an encounter to be consensual." *Id.* (quoting *United States v. Majarrez*, 348 F.3d 881, 886 (10th Cir. 2003)). And when officers showed pictures of Julian and Defendant Chanthavong and asked Nhot if they were in the home, Nhot nodded his head and pointed towards the house. *Id.* Then, when asked if officers could come inside, Nhot nodded his head and stepped aside with the doorway open. *Id.* at 8-9 (quoting Transcript at 36-37, 80). When officers entered the residence, the Government argues that Nhot "did not protest their entry or attempt to close the door." Docket No. 49 at 3 (citing Transcript at 36-37, 46). These actions, the Government argues, indicate that Nhot provided his consent for the officers to enter and search his residence.

The court disagrees and finds that Nhot's consent was not unequivocal, specific, and intelligently given. Although the Government asserts that Nhot seemed to acquiesce to the search without protesting, acquiescence alone does not render a search consensual. In *Benitez-Arreguin*, the Tenth Circuit concluded that the search of a bag was non-consensual despite the fact that "[t]he defendant did nothing to stop them [officers] from searching the suitcases because they were policemen . . ." 973 F.2d at 825. Similarly, Nhot's acquiescence to the officers is not dispositive here. Because Nhot was a refugee who had immigrated to the United States, he may not have been aware of his rights in this situation. For example, he might have believed that the officers were entitled to enter the residence, with or without his consent. Alternatively, the late hour and the number of officers present at the scene created an inherently coercive environment.

Thus, Nhot's lack of resistance towards the officers as they entered the residence does not, by itself, render the search consensual.

The language barrier between the officers and Nhot also poses a problem for the Government's argument. Although the Government cites Tenth Circuit precedent establishing that "a working knowledge of English" is all that is required to consent to a warrantless search, the Government has presented absolutely no evidence suggesting that Nhot's proficiency of English met this relatively low standard. In *Benitez-Arreguin*, the Tenth Circuit affirmed the district court's conclusion that "[t]he pantomime gestures were not sufficient to produce a consent to search." 973 F.2d at 826. The court based this conclusion on the fact that there was "no clear and unequivocal or specific permission" provided by the defendant, who did not speak English. *Id.*

In this case, the permission granted by Nhot is even less clear and specific than the contested consent at issue in *Benitez-Arreguin*. During the evidentiary hearing, some witnesses testified that Nhot pointed to a room upstairs, *see e.g.* Transcript at 12, whereas other officers testified that he simply pointed inside the home. *See e.g.* Transcript at 22. These conflicting descriptions highlight the ambiguity of Nhot's seemingly straightforward gestures. If the pantomime gestures in *Benitez-Arreguin* were insufficiently descriptive to establish consent that was clear and specific to search a bag, Nhot's gestures were certainly not specific enough to establish parameters for the warrantless search of a two-story residence. Given the range of potential interpretations that could be associated with Nhot's gestures and based on the totality of the circumstances, the court finds that the officers did not obtain valid consent to conduct a warrantless search of the Xayaso residence.

III. CONCLUSION

The Government has not met its burden to prove that Nhot's consent to search his residence was "unequivocal and specific and freely and intelligently given." For these reasons, Defendant Chanthavong's Motion to Suppress is **GRANTED**.

Signed November 25, 2019.

BY THE COURT



Jill N. Parrish
United States District Court Judge